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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

LESLIE MILLER, INC., APPELLANT

v.

STATE OF ARKANSAS

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

STATEMENT

Appellant is a non-resident general contractor which performed work in Arkansas pursuant to a contract with the United States Government on real property purchased by the government. The contract was for construction of facilities at the Air Force Base in Pulaski County, Arkansas, and amounted to $1,093,431.00 (R.14). It was stipulated that the United States had not accepted jurisdiction over the lands in Pulaski County as required by 40 USCA Sec. 255 (R.5).

Certain unlicensed contractors, undoubtedly acting on advice of counsel, did not offer bids for the job which appellant performed. A number of licensed contractors did bid for this job (R.6).

The Contractor's Licensing Board filed complaints against appellant pursuant to which the Prosecuting Attorney for Pulaski County filed an information on appel-

lant which set out two counts (1) submitting bids for and (2) contracting and performing work in connection with the aforesaid project without first procuring a license as required by the Arkansas law. Appellant was fined $100 on each count and appealed to the Supreme Court of Arkansas.

The Supreme Court of Arkansas affirmed the judgment. The Court held that the United States had not acquired jurisdiction over the land so as to exclude State regulation and rejected the argument that the State Statute was inapplicable under the doctrine of implied intergovernmental immunity. The Court said appellant was an independent contractor and was not clothed with governmental immunity merely because of its contractual relationship with the United States (R.9-12).

Appellant concedes in this appeal that the Supreme Court of Arkansas was correct in holding that the United States had not acquired jurisdiction so as to exclude State jurisdiction and has abandoned this argument. The remaining issues have been sufficiently stated by appellant.

ARGUMENT

I

The Arkansas State Licensing Law for Contractors Is Applicable and Its Enforcement as to Appellant Is Valid

In support of the contention that appellant may not constitutionally be convicted for entering into a contract with the United States for military construction in Arkansas without first becoming licensed pursuant to the Arkansas State Licensing Law for Contractors, appellant first argues that the Act's application interferes with the performance of federal functions and under the doctrine of implied intergovernmental immunity cannot apply to appellant's activities in Arkansas.

In making this contention appellant recognizes that this Court has many times held in certain tax cases that an independent contractor is not accorded governmental immunity merely because of his contractual relationship with the federal government. *Penn Dairies, Inc.* v. *Milk Control Commission,* (1942) 318 U.S. 261, 87 L. ed. 748; *James* v. *Dravo Contracting Co.,* (1937) 302 U.S. 134, 82 L. ed. 155, 114 ALR 318; *Metcalf & Eddy* v. *Mitchell,* (1925) 269 U.S. 514, 70 L. ed. 384; *James Stewart & Co., Inc.* v. *Katherine Sadrakula, Admrx.,* (1940) 309 U.S. 94, 84 L. ed. 596, 127 ALR 821; *Alabama* v. *King & Boozer,* (1941) 314 U.S. 1, 86 L. ed. 3. Appellant predicates its entire argument in this respect on certain tests which it alleges have been posed in these cases. We note that appellant quotes brief excerpts out of context as descriptive of what it considers the proper tests to be applied in determining the extent to which those who do business with the Federal Government may be regulated by the States. However,

appellant has not cited a single case in which this Court has struck down a state regulatory statute. No specific test has been laid down by this Court in these cases and theoretical assertions of interference with federal functions have not been entertained. To the contrary, primary considerations were stated by this Court in *Trinityfarm Construction Co.* v. *Grosjean*, (1934) 291 U.S. 466, 78 L. ed. 918, as follows:

> "Its application does not depend upon the amount of the exaction, the weight of the burden or the extent of the resulting interference with sovereign independence. Where it applies, the principle is an absolute one wholly unaffected by matters or distinctions of degree. *Indian Motorcycle Co.* v. *United States*, 283 U.S. 570, 575, 75 L. ed. 1277, 1281, 51 S. Ct. 601, and cases cited. Its right application is essential to the orderly conduct of the national and the state governments and the attainment of justice as between them."

Irrespective of whether the possibility of a fixed test exists in resolving the scope of the doctrine of implied immunity, it is certain that this Court has sharply limited the doctrine in recent years. In *Oklahoma Tax Com.* v. *Texas Co.*, (1949) 336 U.S. 342, 93 L. ed. 721, this Court said:

> "It is true that this Court's more recent pronouncements have beaten a fairly large retreat from its formerly prevailing ideas concerning the breadth of so-called intergovernmental immunities from taxation, a retreat which has run in both directions—to restrict the scope of immunity of private persons seeking to clothe themselves with governmental character from both federal and state taxation. The history of the immunity, by and large in both aspects, represents a rising or expanding curve, tapering off into a falling or contracting one."

Appellant's argument in this respect has been answered many times by this Court. We find in all of the applicable decisions the proposition that the Constitution has left Congress free to set aside local taxation and regulation of government contractors and that where Congress has not done so, any alleged burdens are the normal incidents of our dual system of government. In *James* v. *Dravo Contracting Co., supra,* this Court in answer to the "economic burden" argument said:

> "The argument ignores the power of Congress to protect the performance of the functions of the national government and to prevent interference therewith through any attempted state action. In *Thomson* v. *Union P. R. Co.*, 9 Wall. 579, 19 L. ed. 792, *supra*, the Court pointedly referred to the authority of Congress to prevent such an interference through the use of the taxing power of the State. 'It cannot', said the Court, 'be so used, indeed, as to defeat or hinder the operations of the National government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection'."

And in *Penn Dairies, Inc.* v. *Milk Control Commission, supra*:

> "Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional pol-

> ployed on a Public Works Administration project, upheld in *Baltimore & A. R. Co.* v. *Lichtenberg*, 176 Md. 383, 4 A(2d) 734, *supra;* or the local building regulations applied to a contractor engaged in constructing a post-office building for the government, sustained in *James Stewart & Co.* v. *Sadrakula*, ***."

Such an increase in cost and limitation of free agents, both of which are extremely remote, are not significant in resolving the applicability of the Act because here again this argument ignores the power of Congress to protect federal functions and prevent interference. *James* v. *Dravo Contracting Co., supra.*

Appellant has lifted the penal provisions and the Board's right of injunctive relief provision from the statute and insists that these impair the contractor's ability to perform his contract. Obviously this is true because that is the express purpose of these provisions, otherwise, the statute would have no legal sanction, and would be useless.

In the final analysis the over-all purpose of the statute is protection of public health and safety. It makes for a better group of competitive bidding contractors and protects the public and government as well.

In summary we believe that all of these contentions raised by appellant were adequately answered by this Court in the Penn Dairies case, *supra.* This Court there said:

> "The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government, with authority in the states

to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, see *Metcalf & Eddy* v. *Mitchell, supra,* (269 U.S. 523, 524, 70 L. ed. 392, 393, 46 S. Ct. 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, * * *."

II

The Arkansas Statute Applies Irrespective of Alleged Interferences with Federal Functions Because Arkansas Has Jurisdiction over the Land

Appellant has admitted that Arkansas has jurisdiction over the land in question and the United States has conceded that the Supreme Court of Arkansas' decision in this regard is plainly correct (Amicus Curiae brief p. 5, footnote 3). The only conclusion that can be drawn from this admitted fact is that the Arkansas Statute applies irrespective of alleged interferences and burdens.

In *Adams* v. *United States,* (1942) 319 U.S. 312, 87 L. ed. 1421, this Court stated that acquisition of title and surrender of jurisdiction by the State was not enough to confer jurisdiction upon the United States, and before the United States could acquire jurisdiction it must accept jurisdiction as required by 40 USCA Sec. 255. This Court further pointed out that it was the continuing confusion and controversy over the subject of state jurisdiction versus federal jurisdiction that caused Congress to adopt the Act of October 9, 1940. That was an amendatory act which provided in part:

> "Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

Thus a definite method of acceptance was created in order that all concerned could be apprised of whether the Government had obtained jurisdiction. Therefore, both Congress and this Court have told the Government in this case the procedure it should have followed to obtain jurisdiction. The Government has chosen to ignore this mandate and now seeks to tell the State of Arkansas which of her laws based on police power it wants enforced and which it does not.

III

The Arkansas Statute Is Consistent with Federal Laws Regulating Procurement Because Government Construction Contracts Require Compliance with State Licensing Laws

The Arkansas statute is not inconsistent with federal laws regulating procurement because the standard government construction contract requires that State licensing laws be complied with. U. S. Standard Form No. 23-Rev., 41 USCA, Appendix, Sec. 54.13, provides in part as follows:

> "Art. 10. Permits and responsibility for work. The contractor shall, without additional expense to the Government, obtain all required licenses and permits * * *"

This requirement is plain and specific. Appellant has searched the regulations at length to draw nice implications of congressional purpose. Here the intent of Congress is expressed and not implied. These procurement regulations have the force of law and appellant was required as a matter of law to comply with the State

Statute. Congress must have so intended, because it could have acted to change this requirement.

In addition to the foregoing, appellant's argument in connection with the Armed Forces Procurement Act of 1947 is not persuasive in the light of this Court's decision in the Penn Dairies case. Substantially the same argument was advanced in that case and the Court held:

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication, *United States* v. *Borden*, 308 U.S. 188, 198, 199, 84 L. ed. 181, 190, 191, 60 S. Ct. 182; *United States* v. *Jackson*, 302 U.S. 628, 631, 82 L. ed. 488, 491, 58 S. Ct. 390; *Posadas* v. *National City Bank*, 296 U.S. 497, 503-505, 80 L. ed. 351, 355, 356, 56 S. Ct. 349, should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation.
>
> "Hence in the absence of some evidence of an inflexible Congressional policy requiring government-contracts to be awarded on the lowest bid despite noncompliance with state regulations other wise applicable we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. It would be no more than speculation for us to say that Congress would consider the government's pecuniary interest as a purchaser of milk more important than the interest asserted by Pennsylvania in the stabilization of her milk supply through control of price. Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Fur-

thermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden."

Thus we see that even without the express provision of obtaining required licenses, this Court has refused to strike down a regulatory statute based on allegations of inconsistency with federal laws regulating procurement.

CONCLUSION

If appellant is not subject to the Arkansas State Licensing Law for Contractors, then Arkansas is without the power or right to maintain peace and order within her borders at a time when the United States Government has declined to accept that responsibility over its properties. The decision of the Supreme Court of Arkansas is correct and should be affirmed in every respect.

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